IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 1598 of 2001
(Old No. 318 of 1991)

Date of decision : 19th June, 2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date : 19.06.2007 Initials of Judge

Note : Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 1598 of 2001
(Old No. 318 of 1991)

1. Swaran Singh
2. Sarjit Singh S/o Harbansh Singh
R/o Village Laxmipur
Police Station Kashipur,
Nainital ....Appellants

Versus

State of U.P. ... Respondent

Mr. B.S. Adhikari, learned counsel for the appellants
Mr. G.S. Sandhu, Govt. Advocate for the respondent/State

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1. This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (for brevity as Cr.P.C.), is directed against the judgment and order dated 18.02.1991, passed by learned Sessions Judge, Nainital in Sessions Trial No. 256 of 1988, whereby the appellants have been convicted & sentenced to undergo imprisonment for life under section 302/34 Indian Panel Code, 1860 (for brevity as I.P.C.).

2. Brief facts of the case are that Harbhajan Singh PW1 lodged an F.I.R. (Ex.Ka.1) in the Police Chawki Kundeshwari on 20.05.1988 alleging therein that on 20.05.1988, he was ploughing his field by tractor in village Dhakia Kalan. He was accompanied with his sons Kala Singh, Vikkar Singh and his relative Sri Pal Singh. At about 9:30 a.m. on 20.05.1988, four accused persons namely Swarn Singh, Sarjit Singh, Singhara Singh and Papu alias Jaswant Singh, how were residents of Village Laxmipur, came there armed with lathis, gun and country made pistol in their hands and asked

Harbhajan Singh and his companions that the plot belonged to them and why they were ploughing it. Due to this, there was an altercation between the parties. Swarn Singh was armed with gun and Sarjit Singh was armed with country made pistol. Swarn Singh and Sarjit Singh fired at them by gun and country made pistol with the intention to kill them which resulted head and shoulder injuries to Pal Singh who fell down on the ground due to injuries sustained by him. After commission of the offence, the accused fled away from the spot. It was further alleged in the F.I.R. that the accused were seen and identified in the light of the tractor and torch. Thereafter, the injured Pal Singh was brought to Kundeshwari by tractor but when they reached in front of the clinic of Dr. Nagar, the injured succumbed to his injuries. On the basis of the F.I.R., chick report (Ex.Ka.4) was prepared and necessary entry was made in the General Diary vide Ex.Ka.5 and case was registered against the accused persons. The case was investigated by S.I. Sri S.S. Chauhan who took the statement of the witnesses and visited the place of occurrence on 20.05.1988. He prepared the site plan Ex.Ka.6 and panchayatnama Ex.Ka.7 of the dead body. After completing the investigation, he submitted the chargesheet (Ex.Ka.14) before the court.

3. The accused/appellants were charged u/s 302/34 I.P.C. The accused/appellants denied the charges and claimed to be tried.

4. The prosecution in support of its case examined Harbhajan Singh PW1, reporter and witness of the fact; Sri Vikkar Singh PW2 & Sri Kala Singh PW3 other witnesses of the fact; Sri Lakhha Singh PW4, witness of recovery of two

empty cartridges from the spot and proved the recovery memo of the said cartridges; H.C. Sri Murli Singh PW5 prepared chick report Ex.Ka.4 and entered the case in the G.D. Ex.Ka.5; and S.I. Sri Surat Singh Chauhan PW6, Investigated the case and submitted the chargesheet Ex.Ka.14.

5. The accused/appellants were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated that they have been falsely implicated due to enmity. The accused Swaran Singh had stated that all his villagers including he himself have enmity with the reporter Harbhajan Singh. He has further stated that he has purchased 1-1/2 acres of land from Smt. Bhajan Kaur and the reporter Harbhajan Singh has dispute with Smt. Bhajan Kaur in respect of that land and due to it, there was enmity.

6. The learned Sessions Judge on appreciation of the evidence held accused-appellant Swarn Singh and Sarjit Singh guilty to the offences charged against them and convicted & sentenced them as mentioned above whereas Singhara Singh and Papu were not found guilty of the offence charged against them and they were accordingly acquitted.

7. We have heard learned counsel for the parties and perused the record.

8. At the outset, it needs to be mentioned here that it is not disputed that the deceased Pal Singh died on account of firearm injuries sustained by him on the date of occurrence. Dr. P.K. Joshi, autopsy surgeon conducted the postmortem of deceased Pal Singh on 21.05.1998 at about 3:00 p.m. and

found the following ante mortem injuries on the person of the deceased:-

1. Circular 1 cm. wound on left side of skull 1 cm. above pinna of ear. Margins inverted. Bone fractured and 6 cm. deep.

2. Cricular 4 cm. wound on left shoulder. Outer aspect. Size muscle deep. No tattoing and no scorching present. Pellet recovered behind scapular region (one).

In the opinion of Medical Officer, the death of the deceased was caused due to shock and haemorrhage as a result of ante mortem injury No.1. Thus, it is amply proved that the deceased died on account of the injuries sustained by him on the date of occurrence. The post mortem report Ex.Ka.3 has been admitted by the accused/appellants before the trial court.

9. Now, we have to consider who is responsible for causing that fatal injuries on the person of the deceased. It is also pertinent to mention here that a cross case relating to the occurrence which ha taken place on 20.05.1988 was also registered as Crime No. 393A/88 (S.T. No. 105 of 1989) as has been deposed by H.C. Sri Murli Singh PW5. Vikkar Singh PW2 has also stated in his evidence that a cross case in respect of this occurrence was instituted on the report of Sri Suchha Singh S/o Bhajan Kaur u/s 307 I.P.C. about one month after the occurrence. The accused/ appellants have also filed copy of the evidence of Sri Suchha Singh who was produced by the prosecution as PW1 in the cross case in S.T. No. 105 of 1989. It reveals that Sri Suchha Singh has lodged the report in the cross case on 18.06.1988 and he had got his injuries medically examined 20 days' after the occurrence. It

also reveals that the incident took place in the field which stand recorded in the name of Smt. Bhajan Kaur, mother of Sri Suchha Singh, the complainant of the cross case. It is also pertinent to mention here that the accused/appellant Swaran Singh in his statement recorded u/s 313 Cr.P.C. has stated that there was dispute between the complaisant and Bhajan Kaur regarding 1-1/2 acres of land which the accused/appellant Swaran Singh alleged to have purchased from Smt. Bhajan Kaur. The accused/appellant also field copy of the sale deed of the said land. According to the sale deed executed by Bhajan Kaur in the name of Mahendra Kaur w/o Swaran Singh in which 1-1/2 acres of land of plot No. 391/1 has been purchased by her. A suggestion has been put to Harbbhajan Singh PW1 that the hut of Smt. Bhajan Kaur is situated at plot No. 391/1 on which the occurrence took place. Harbhajan Singh PW1 has admitted the suggestion. The accused/appellant Swaran Singh has stated in his statement recorded u/s 313 Cr.P.C. that he has purchased 1-½ acres of land from Bhajan Kaur and there is a dispute regarding the same land between the informant Harbhajan Singh with Bhajan Kaur and due to this enmity he has been falsely implicated in the case. It is not disputed that the occurrence took place in the plot No. 391/1 and the same was recorded in the name of Bhajan Kaur at the time of the occurrence.

10. The prosecution has adduced the evidence of Harbhajan Singh PW1, Sri Vikkar Singh PW2, Sri Kala Singh PW3. They were present at the spot and they have seen the occurrence. Harbhajan Singh PW1 has stated that the accused/appellants belonged to Village Laxmipur and they did not have any land in village Dakia Kalan. Harbhajan Singh PW1 has further

deposed that he was ploughing the field at the time of the incident and he was accompanied with his sons Kala Singh PW3, Vikkar Singh PW2 and one relative Pal Singh in the plot. He has further stated in his evidence that on the date of incident he was ploughing the said plot by tractor. When accused persons came there they were identified in the light of tractor and torch. They asked Harbhajan Singh PW1 and other persons present at the spot as to why they were ploughing the said plot which belonged to them. An altercation took place in between them. The accused /appellant Swaran Singh was armed with gun and appellant Sarjit Singh was armed with country made pistol. The remaining accused were holding lathies in their hands. On exhortation by the co-accused Singhara Singh and Pappu alias Jaswant, the accused/appellant Swaran Singh and Sarjit Singh fired upon the persons present on the plot with the firearms held by them which hit Pal Singh on his head and shoulder. Thereafter, the accused filed away from the place of occurrence. The injured Pal Singh was taken to Kundeshwari by tractor. When they reached near the medical shop of Dr. Nagar at Kundeshwari, the injured Pal Singh died there. Thereafter, he lodged the report ex.Ka.1 in the police station Kundeshwari. Vikkar Singh PW2 and Kala Singh PW3 were also present at the spot alongwith Harbhajan Singh PW1. They have narrated the entire incident in their evidence and they have corroborated the testimony of Harbhajan Singh PW1. The learned counsel for the appellants has cross examined the witnesses Harbhajan Singh PW1, Vikkar Singh PW2 and Kala Singh PW3 at length but nothing could be elicited from their cross examination to discredit their testimony. The evidence of the eyewitnesses is consistent and they have corroborated the prosecution story.

The evidence of Harbhajan Singh PW1, Vikkar Singh PW2 and Kala Singh PW3 is credible and cogent. After considering the eye witnesses in toto, the learned Sessions Judge found the evidence to be implicitly truthful and reliable. Their presence at the place of incident was natural. The manner of the assault as described by them is further corroborated by the post mortem report Ex.Ka.3. The testimony of the ocular witnesses is consistent on material features of the prosecution case. The presence of the witnesses was attempted to be shown as doubtful but we do not find any reason to accept it. Their presence at the place of occurrence has been explained and it was natural. Their evidence cannot be thrown out as unreliable or tainted merely because they are related to the deceased (See **State of Punjab Vs. Karnail Singh** reported in **2004 SCC (Cri) p/135**). The evidence of witnesses is credible and cogent.

11. Learned counsel for the appellants further contended that there are inconsistencies and contradictions in the evidence of the prosecution witnesses. Learned G.A. refuted the contention and contended that minor discrepancies are bound to creep in the testimony of truthful, natural and reliable witnesses when they speak about the details. We have gone through the entire evidence of the witnesses examined by the prosecution and found that whatever was stated was by way of clarification and certainty and it cannot be termed to be a contradiction or inconsistency. The witnesses were examined after 17 months of the incident. It is natural there would be variations and discrepancies in the evidence of the witnesses. Unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. It is quite natural that the

persons narrate the story in different ways and in different words at different times. The witnesses are villagers and they have their own notions about the narration of the facts. The minor discrepancies are bound to creep in the testimony of natural and reliable witnesses. The minor discrepancies in evidence of the witnesses are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. The discrepancies which have been pointed out by the learned counsel for the accused-appellants in the evidence are on account of normal errors of memory due to mental disposition due to the death of their nearest relative. Such discrepancies are normal in the truthful depositions. By and large the people cannot accurately recall the sequence of the events which took place in short span and reproduce the sequence of events before the Investigating Officer or the Court. They can only recall the main purport of the incident. It is unrealistic to expect a witness to be a human tape-recorder or video camera. The witnesses cannot be expected to pose a photographic memory and to recall the details of an incident. The witnesses are overtaken by the incident because they could have not anticipated the occurrence which shows after as an element of surprise. In the instant case, the witnesses have narrated the main purport of the incident. The prosecution witnesses cannot be expected to recall accurately the sequence of the events which took place in a rapid succession or short span of time. A witness is likely to get confused or mixed up when interrogated later on. It cannot be expected from a witness to narrate the incident with mathematical niceties in criminal cases. The contradictions as pointed out by the learned

counsel for the accused-appellants are of minor nature and these contradictions and inconsistencies do not render the evidence of the prosecution witnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Before Harbhajan Singh PW1 his relative was murdered and it is quite natural to create a sense of shock and minor variation in the evidence do not effect his testimony which is otherwise credible. The learned trial court has also dealt this aspect in detail. We are completely in agreement with the finding recording by the learned trail court in this respect.

12. Learned counsel for the appellant further contended that the presence of tractor at the spot was not established by the prosecution evidence. He further contended that if tractor was not at the spot, there was no source of light to recognize or identify the accused-appellants. Harbhajan Singh PW1 and Kala Singh PW3 have deposed in their evidence that there was a light of tractor and torch by which they recognized the accused-appellants. He further contended that Vikkar Singh PW2 has stated nobody was having the torch at the spot. He further contended that the said tractor was not seized by the Investigating Officer, as such, the presence of the tractor was doubtful at the spot. Learned G.A. refuted the contention. As we have already pointed out that cross case in respect of this occurrence was instituted on the report of Sri Suchha Singh S/o Bhajan Singh u/s 307 I.P.C. and trial was also held bearing S.T. No. 105 of 1989 in the court of Sessions Judge, Nainital. The prosecution witnesses Harbhajan Singh PW1, Vikkar Singh PW2 and Kala Singh PW3 have categorically stated in their evidence that they saw and identified the accused persons in the light of tractor. They have also stated

the arrest. According to the post mortem report Ex.Ka.3 a pallet was removed from inside brain and handed over to the police. It was further contended that the C.M.P., empty cartridges, live cartridges, gun and pellet recovered from the body of deceased were not sent to the ballistic expert for any expert examination. This is a serious infirmity in the prosecution case and assumes even greater consequences that the deceased had received firearm injuries on his head. Learned G.A. refuted the contention. It is true that Investigating Officer while arresting the accused/appellants Swaran Singh and Sarjit Singh recovered from their possession a licencee gun and three cartridges and country made pistol alongwith cartridges respectively. It is no reason to doubt the testimony of the witnesses where the ocular testimony of the witnesses is of unimpeachable character and the nature of the injuries disclosed by the post mortem report is clearly consistent with the direct evidence. So, examination of the ballistic expert may not be regarded as essential. In the instant case, there is a credible and cogent evidence of the eyewitnesses and merely not sending the said articles to the ballistic expert is not fatal to the prosecution case. Where the direct eyewitnesses account is not satisfactory and there are inconsistencies in between the ocular testimony and the medical testimony, the inconsistency can be cured or the oral evidence can be corroborated by leading the corroborative evidence of ballistic expert.

14. it was further contended that the investigating officer had not taken the blood stained soil from the spot and he had not taken into the possession the bed sheet in his possession by which the deceased was brought to doctor in tractor. If

The Investigating Officer has not sent the said article to the ballistic expert, or failure to collect the blood stained soil from the spot etc., it is merely remissness on the apart of the Investigating Officer and the evidence of the prosecution witnesses would not be impaired in any way. Even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting the accused solely on account of the defect; to do so would tantamount to play into the hands of the investigating officer if the investigation is designedly defective. **{See Karnel Singh Vs. State of M.P. 1995 Crl.L.J. 4173, Chhotu Vs. State of Maharashtra 1997 Cri.L.J. 4394 (SC) and Dhanaj Singh Alias Shera & others Vs. State of Punjab 2004 (3) SCC p/654}**

15. The incident took place at 9:30 p.m. on 20.05.1988 and Harbhajan Singh PW1 reported the matter to police station on 20.05.1988 at 10:50. The distance between the police station and the place of occurrence is about 4-1/2 kms. it is also in the evidence that the deceased sustained the firearms injuries at the spot and he was taken to Kundeshawri. When they reached Kundeshwari near the clinic of Dr. Nagar, the deceased died and thereafter report was lodged. Thus, there is a prompt F.I.R. The prompt FIR thus inspires confidence that it was not the outcome of any consultation or deliberation. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which

the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a colored version or exaggerated story. The fact that the accused/appellants fired shots upon the deceased further stands corroborated by the prompt FIR in which the name of the accused/appellants have been shown.

16. Sor far as motive is concerned, the prosecution has led the evidence that the accused/appellant have motive to commit the offence on account of the fact that the complainant party was ploughing plot in question on which they were in possession and which was recorded in the name of Smt. Bhajan Kaur. It is also on record that 1-1/2 acres of land of plot 391/1 belonging to Bhajan Kaur was purchased by Smt. Mahendra Kaur w/o Swaran Singh/ appellant. According to the prosecution case, they were ploughing the field in question and the accused/appellants reached at the spot holding firearms in their hands. They asked Harbhajan Singh and other persons present at the spot that the said plot belonged to them and why they were ploughing their plot and altercation took place between them. Thereafter, accused/appellant Swaran Singh and Sarjit Singh fired with their weapons on the complainant party. The accused/appellants came at the spot armed with weapons. The evidence of prosecution is credible and cogent on this point. The learned trial court was justified in holding that there was sufficient motive to cause the injuries on the

persons of the deceased. Even assuming that the prosecution has not put forward any motive on the part of the accused-appellants to commit the crime, it would not reflect upon the credibility of the witnesses. It is well settled principle of law that if the ocular evidence is reliable, satisfactory and convincing hen the absence of motive becomes irrelevant for the decision of the case. It is also well settled that establishment of motive is not sine quo non for proving the prosecution case. It was held in **Yunus Vs. State of M.P. SCC 2003 (1) p/429:-**

> ***"****The prosecution in the present case has failed to prove the motive. Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is also well settled law that establishment of motive is not sine quo non for proving the prosecution case."*

In the case in hand, the prosecution has established the motive for the commission of the offence.

17. The prosecution has adduced the evidence of Harbhajan Singh PW1 that the accused/appellants neither possess any land in village Dakia Kalan nor they were in possession of any such land. He has further stated in his evidence that he was ploughing his plot alongwith his sons Vikkar Singh PW2, Kala Singh PW3 and his relative deceased Pal Singh. Vikkar Singh PW2 and Kala Singh PW3 have further corroborated the evidence of Harbhajan Singh PW1 on the point of possession. It is not disputed that the occurrence has taken place on plot

No. 391/1 which stand recorded in the name of Smt. Bhajan Kaur w/o Kundan Singh The accused-appellants Swaran Singh has stated in his statement recorded u/s 313 Cr.P.C. that there was dispute between the complainant and Bhajan Kaur regarding 1-1/2 acres of land which the accused/appellant Swaran Singh alleged to have purchased from Smt. Bhajan Kaur. The sale deed filed by the defence reveals that 1-1/2 acres of land of plot No. 391/1 has been purchased by Mahendra Kaur w/o accused/appellant Swaran Singh. Merely recital in the sale deed did not prove the possession of the accused/appellants. There is no other evidence on behalf of the defence that they were in possession over the land in dispute. The prosecution has established by the evidence of Harbhajan Singh PW1, Vikkar Singh PW2 and Kala Singh PW3 that the complainant party was in possession over the land in dispute.

18. It was further contended by the learned counsel for the accused/appellants that from the facts and circumstances of the case no offence under section 302 IPC is made out against the accused/appellants. It was further contended that at the most even if the evidence was found credible against the accused/appellants. The offence punishable under section 304 IPC is only made out against the appellants. It was further contended that in the facts and circumstances of the case, the case of the accused/appellants falls Exception 4 of 300 I.P.C. The learned G.A. refuted the contention. The pivotal plea taken by the appellants relates to the applicability of Exception 4 of 300 IPC. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having

taken undue advantage. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by First Exception. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel manner, and (d) the fight must have been with the person killed. This exception comes into play if death is caused without premeditation. Premeditation may be established by direct or positive evidence or by circumstantial evidence. But premeditation is proved by showing the manner of the killing and the circumstances under which it was done or from other facts in evidence. In the case in hand, as we have noticed above, the appellants were armed with gun and country made pistol in their hands. When the appellants reached at the place of occurrence, the plot was being ploughed by Harbhajan Singh PW1. He was accompanied with his sons Vikkar Singh PW2, Kala Singh PW3 and his relative deceased Pal Singh at the place of occurrence. They were unarmed and there was no provocation on the part of the complainant. When the accused-appellants reached at the spot with arms in their hands, they immediately asked Harbhajan Singh PW1 and other persons as to why they were ploughing the field as it belongs to them. Due to this, there is an altercation between the parties. The accused-appellants fired shots upon the complainant party by the firearms which they were holding in their hands at the time of the incident which resulted head and shoulder injuries on the person of Pal Singh who fell down on the ground due to injuries sustained by him and later on he succumbed to his injuries. The accused fled away from the spot. Thus, it cannot be held that it was not

premeditation. The accused/appellants came with firearms in their hands on the place of occurrence. The arrival of the appellants with the firearms in their hands clearly proves the intention of the appellants that they reached at the spot with the intention either to cause grievous injuries to the complainant party or to kill them. Thus, premeditation is proved by the manner of killing of Pal Singh by using the firearm in the incident. Thus it cannot be held that it was a sudden fight. The appellants fired shots upon the deceased Pal Singh and he sustained the injuries on his head and shoulder. The injuries were caused on the vital part of the body. Dr. P.K. Joshi, autopsy surgeon has opined that the death occurred due to the ante mortem injury no. 1 resulted in shock and haemorrhage inside the brain. In view of the above, we do not find any substance in the argument raised by the learned counsel for the appellants.

19. For the reasons as discussed above, we are of the view that the evidence of Harbhajan Singh PW1, Vikkar Singh PW2 and Kala Singh PW3 is credible, cogent and natural. Their evidence has sufficiently proved the guilt of the accused/appellants. The F.I.R. was lodged with promptitude and the medical evidence also corroborates the incident.

20. In view of the aforesaid reasons, we hold that the prosecution has established the guilt beyond reasonable doubt against court has rightly convicted and sentenced the learned trial court has rightly convicted and sentenced the accused-appellants and there is no infirmity in the impugned judgment and order passed by the learned trail court in Sessions Trail No. 256 of 1988. The accused-appellants Swaran Singh and Sarjit Singh are liable to be convicted and

sentence u/s 302/34. Hence, the appeal is liable to be dismissed and is hereby dismissed.

21. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within three months from the date of receipt of order.

(J.C.S. Rawat, J.) **(Rajeev Gupta, C.J.)**

Dated 19th June, 2007
Shiv